No. 285

In the Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA, PETITIONER

v.

ISTHMIAN STEAMSHIP COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
SAMUEL D. SLADE,
MIRIAM MARCUSE,
Attorneys,
Department of Justice, Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 285

UNITED STATES OF AMERICA, PETITIONER

v.

ISTHMIAN STEAMSHIP COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

1. Respondent's brief in opposition, which seeks support in historic admiralty practice and in common law theories relating to set-off and counterclaim, fails to come to grips with the realities of this case. Moreover, it strikingly fails to take account of the rulings of this Court upon which the petition relies.

The essence of this case is that respondent was seeking money which the Government was withholding and that the Government was withholding, not because it questioned respondent's claim, but solely because of a contested claim which it had against respondent. Whether respondent is entitled to any-

483026—58

thing thus depends upon the validity of the Government's claim underlying the act of withholding; there is no other dispute to be litigated.

The decisions of this Court make plain that in these circumstances respondent may not, by artful pleading, convert what is in fact one dispute into two cross-claims.

a. This Court has held that, when the Government is both the debtor and creditor of another, it may, under 31 U. S. C. 71, strike a balance. The consequence of doing so is to discharge the Government's debt *pro tanto*. *United States* v. *Munsey Trust Co.*, 332 U. S. 234, 240; *McKnight* v. *United States*, 13 C. Cls. 292, 306, affirmed, 98 U. S. 179, 186.

b. This Court has further held that if the Government withholds and applies money which is admittedly due "X" in order to satisfy a government claim against "X", a suit by "X" is in substance a challenge to the validity of the Government's claim, even though "X's" complaint may set forth only the transaction which gave rise to the Government's obligation. *United States* v. *New York, New Haven & Hartford R. R. Co.*, 355 U. S. 253, 263; *Alcoa S. S. Co.* v. *United States*, 338 U. S. 421, 422; *Reynolds* v. *United States*, 292 U. S. 443; *Wabash Ry. Co.* v. *United States*, 59 C. Cls. 322, 327, affirmed *sub nom. United States* v. *St. Louis, etc., Ry. Co.*, 270 U. S. 1.

c. This Court has repeatedly decided, in other contexts as well, that admiralty must discard outmoded forms so that it may completely and justly dispose of a controversy. *British Transport Commission* v.

United States, 354 U. S. 129, 139; *Hartford Accident Co.* v. *Southern Pacific Co.*, 273 U. S. 207, 216; *Krauss Bros. Co.* v. *Dimon S. S. Corp.*, 290 U. S. 117; *Swift & Co.* v. *Compania Caribe*, 339 U. S. 684; *Archawski* v. *Hanioti*, 350 U. S. 532; *Sword Line* v. *United States*, 351 U. S. 976.

2. Respondent relies upon Section 3 of the Suits in Admiralty Act (providing that suits thereunder "shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties"), asserting that set-off would be impermissible if petitioner were a private party. The Government, respondent says (Brief, p. 4), "does not deny" this. Respondent is in error. We carefully pointed out in our petition (pp. 11–13) that the reasons which prompted admiralty courts, 130 years ago, to limit set-offs to those then permissible in equity have ceased to exist; that equity, for at least 45 years, has permitted unrestricted set-off; that the restrictive rule upon which the court below relied has lost all vitality; and that the result reached below is in conflict with principles enunciated by this Court.[1]

[1] The brief in opposition (p. 10) makes the specious argument that the result reached by the court below is identical in substance with the one obtainable under the Federal Rules of Civil Procedure, because, under those Rules, the court could have ordered a separate trial, entered partial judgment, and stayed it. A separate trial, of course, would not be ordered where, as here, the *pro forma* claim is undisputed and the sole controversy is the justifiability of the withholding (cf. Pet. p. 12, fn. 11).

We also urged that there are independent reasons for concluding that Congress did not propose, by the Suits in Admiralty Act, to curtail the Government's traditional power to withhold and apply or to except maritime claims from its exercise. To that view we also adhere.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

SAMUEL D. SLADE,
HERMAN MARCUSE,
Attorneys.

SEPTEMBER 1958.